No. 249

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IN THE

SUPREME COURT OF THE UNITED STATES.

SCOTT N. BROWN,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

The petitioner prays that a writ of certiorari issue by this Honorable Court to review an opinion of the Tennessee Supreme Court in the case of Scott N. Brown v. State of Tennessee. Petitioner was convicted of fraudulent breach of trust and sentenced to serve three years in the State Penitentiary. The original opinion was dated January 8, 1964; the first petition to rehear was denied in an opinion dated March 5, 1964; and an opinion on a second petition to rehear was handed down by the Tennessee Supreme Court April 7, 1964. Publication was not made of the opinion nor was either of the opinions denying petitions to rehear published. A portion of the original opinion has been included in the Appendix to the petition for writ of certiorari at Pages 61A-66A and the two opinions

of the Tennessee Supreme Court relative to the petitions to rehear are copied in full, Pages 67A-68A, Appendix to Petition for Writ of Certiorari and Pages 78A-81A, Appendix to Petition for Writ of Certiorari. The entire record, of course, has been filed with the Clerk of this Honorable Court.

QUESTIONS PRESENTED.

Counsel for the petitioner insists that this Honorable Court should determine whether or not the petitioner was deprived of due process of law as guaranteed him by the Fourteenth Amendment, Constitution of the United States in the criminal proceeding culminating in his conviction of fraudulent breach of trust because (1) there is no evidence in the record of the criminal proceeding supporting a conviction of fraudulent breach of trust as charged in the indictment; (2) the petitioner was indicted under Section 39-4226, Tennessee Code Annotated, for a fraudulent breach of trust but tried and convicted under Section 47-1020, Tennessee Code Annotated; and (3) the jury was not permitted to have a copy of the indictment before them during their deliberation of the case.

STATEMENT OF THE CASE PERTINENT TO THE QUESTIONS RAISED IN THE PETITION.

The indictment in substance alleges that the petitioner unlawfully, feloniously, and fraudulently appropriated $13,400.00 to his own use, the property of the Chase Manhattan Bank, by depositing the same to his own account when he, by virtue of the terms of the trust receipt, was bound to deposit the same with the Pioneer Bank of Chattanooga, Tennessee, to the credit of the Chase Manhattan Bank. The indictment does not allege which section of the Criminal Code of Tennessee was contravened by petitioner's unlawful appropriation of the funds.

The proof supported the allegations in the indictment in every detail. The Tennessee Supreme Court in its summary of the evidence found this to be true.

The Trial Judge in his instruction to the jury read both Section 39-4226, Tennessee Code Annotated and Section 47-1020, Tennessee Code Annotated, to the jury. (Other sections of Tennessee Code Annotated were read to the jury by the Trial Judge but apparently no complaint was made regarding them.) These sections are as follows:

> "'Fraudulent breach of trust' defined.—The fraudulent appropriation of personal property or money by any one to whom it has been delivered on deposit, pledge, sequestration, or to be carried or repaired, or in whose hands or under whose control it may be by his position as clerk, agent, factor, or bailee, or on any other contract or trust by which he was bound to deliver or return the thing received of its proceeds, is a fraudulent breach of trust. So is the fraudulent appropriation of certain specific property by any one to whom it has been delivered on a contract of loan for use, or of letting and hiring, after the time at which, according to the contract, the right of use acquired thereby has ceased, or before that time, by a disposition not authorized by the contract."

Section 39-4226, T. C. A.

> "Fraudulent breaches of trust—Evidence of fraudulent intent—Effect of intermingling proceeds.—The failure of a trustee under a trust receipt transaction as defined in 47-1003 to turn over to the entruster the goods which are the subject of said transaction, or to pay to the entruster the proceeds from the sale of said goods, or so much thereof as is needed to satisfy the entruster's interest in said goods within ten (10) days after the date performance is required in said

trust receipt, which performance may be either on demand or upon the happening of some event as provided in the instrument creating the trust relationship, shall be a fraudulent breach of trust as defined and set out in § 39-4226, and punishable as such. The failure of the trustee to turn over to the entruster the goods which are the subject of the transaction, or to pay the proceeds from the sale of same necessary to satisfy the entruster's interest, shall be prima facie evidence of fraudulent intent.

"No intermingling of the proceeds from the sale of the property embraced in the trust receipt transaction with the funds of the trustee shall destroy the trust relationship in respect to such proceeds created by a trust receipt unless such intermingling was with the express written consent of the entruster. Failure of an entruster to protest against any conduct of the trustee which violates the trust receipt instrument shall not be deemed an acquiescence in such conduct and the establishment of a course of dealing and conduct between the parties other than the fiduciary relationship established by the trust receipt instrument.

"In the event the trustee in a trust receipt transaction as above defined is a corporation or partnership, any officer or director, partner or agent of such a trustee who actively participates in the action which violates this section or who, with knowledge of such violation by another officer, director, partner or agent, acquiesces therein, shall be guilty of a fraudulent breach of trust and punishable as such."

Section 47-1020, T. C. A.

The jury returned a verdict of "guilty as charged" without specifying which section of the Code it found the petitioner had violated. The Tennessee Supreme Court

held that the reading of these two sections of the Code to the jury was not in conflict with or prejudicial to the petitioner's rights and that since these statutes definitely define what constitutes a fraudulent breach of trust, it was proper for the trial judge to read the same in his charge to the jury, adding that Section 40-1802, Tennessee Code Annotated, provides that the indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the Court, on conviction, to pronounce the proper judgment; and then the Tennessee Supreme Court concluded that the indictment satisfied the requirements of a valid indictment.

There are three affidavits sought to be made a part of the record in the criminal case to the effect that the jury was not given the indictment and that it was not available to them during their deliberation of the case. One of these affidavits was signed by Henry V. Grady, who the record will show defended the petitioner in the criminal proceeding. This affidavit was filed September 30, 1963. Another affidavit was made by R. D. Elam, foreman of the jury in the criminal proceeding and filed September 30, 1963. A third was made by the trial judge, the Honorable Tillman Grant, who tried the case. The judge's affidavit was filed March 30, 1964. The motion for a new trial filed in the criminal proceeding was overruled May 27, 1963, and the petitioner was allowed sixty days in which to prepare and file his bill of exceptions. The bill of exceptions was filed July 24, 1963. (Appendix to Petition for Writ of Certiorari, Pages 52A-53A.)

BRIEF AND ARGUMENT.

Counsel for the Respondent insists that the first two questions set out by counsel for the petitioner really constitute only one to the effect that the petitioner was indicted under Section 39-4226, Tennessee Code Annotated, but proved to be guilty under Section 47-1020, Tennessee Code Annotated. He cites a number of United States Supreme Court cases, all to the effect that a conviction not sustained or supported by the proof constitutes a denial of due process to a defendant in a criminal proceeding as guaranteed by the Fourteenth Amendment, Constitution of the United States. There can be no disagreement with this proposition of law, but it is difficult to understand how it could be insisted that these cases are of any value to the petitioner. Cases are also cited to the effect that convictions based upon charges not made constitute a denial of due process and there can be no argument with this proposition of law but again it is not applicable here.

In the first place, the indictment does not state under which section of the Code, § 39-4226 or § 47-1020, it is brought. It merely alleges the facts constituting a fraudulent breach of trust and the allegations are sufficient to show a violation of both sections of the Code, § 39-4226 and § 47-1020. As a matter of fact, the latter section of the Code incorporates the first by its terms. So, it would appear that a reading of both to the jury was necessary in order to define the offense committed, and that the only test that should be applied is whether or not the language of the indictment was sufficient to inform the petitioner of the nature of his offense in clear and concise language to enable the pronouncement of a proper judgment by the trial judge. The following excerpt from **Russell v. United States**, 369 U. S. 749, 765-766, 82 S. Ct. 1038, 1047-1048, is not inconsistent with the requirements for a valid indictment under the Tennessee law:

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.'" United States v. Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588. An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him * * * is defective, although it may follow the language of the statute." United States v. Simmons, 96 U. S. 360, 362, 24 L. Ed. 819. "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; * * *." United States v. Carll, 105 U. S. 611, 612, 26 L. Ed. 1135. "Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." United States v. Hess, 124 U. S. 483, 487, 8 S. Ct. 571, 573, 31 L. Ed. 516. See also Pettibone v. United States, 148 U. S. 197, 204-206, 13 S. Ct. 542, 545, 37 L. Ed. 419; Blitz v. United States, 153 U. S. 308, 315, 14 S. Ct. 924, 927, 38 L. Ed. 725; Keck v. United States, 172 U. S. 434, 437, 19 S. Ct. 254, 255, 43 L. Ed. 505; Morissette v. United States, 342 U. S. 246, 270, n. 30, 72 S. Ct. 240, 253, 96 L. Ed. 288. Cf. United States v. Petrillo, 332 U. S. 1, 10-11, 67 S. Ct. 1538, 1543, 91 L. Ed. 1877. "That these basic principles of fundamental fairness retain their full vitality under modern con-

> cepts of pleading, and specifically under Rule 7 (c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions."

The indictment in the case at bar sets out the species of the offense,—fraudulent breach of trust—and then relates the specific acts constituting the offense. Counsel for the Respondent knows of no rule in any jurisdiction requiring that the Code section violated must be cited as appears to be insisted upon by counsel for the petitioner.

Reliance is had upon affidavits by counsel for the petitioner in the criminal proceeding, the foreman of the jury which found the petitioner guilty in the criminal case, and the trial judge before whom it was heard. These affidavits were made long after the time had expired for preparing and filing the bill of exceptions. Section 27-111, Tennessee Code Annotated, allows a maximum of ninety days for preparing and filing the bill of exceptions after the motion for a new trial is overruled and provides, of course, that the trial judge may limit the time to not more than thirty days. In this particular case, he limited the time for preparing and filing the bill of exceptions to sixty days from the date of entry of the Order of the motion for a new trial. The Order overruling the motion for a new trial was entered May 27, 1963. Two of the affidavits were filed September 30, 1963, and the other March 30, 1964, long after the time for the bill of exceptions to be filed and long after the time it was in fact filed. The Tennessee Supreme Court in its opinion (Appendix to the Petition for Writ of Certiorari, Page 80A) held that these affidavits did not constitute a part of the record and were improper for consideration on review, citing **Sherman v. State**, 125 Tenn. 19, 140 S. W. 209. An excerpt from Page 51 of that case is as follows:

> "As to these matters occurring during the trial in the presence of the court, the trial judge is the

proper witness. Such matters must not be brought into a bill of exceptions merely by affidavits of parties or of counsel, but to be considered in this court, they must otherwise appear in the bill of exceptions, properly in narrative form. To such parts of a bill of exceptions, the attention of the trial judge is always directed, as no bare narration can be therein included without his authority, and he vouches for the accuracy of everything so stated. In any event, the trial judge must in some way certify or verify the actual occurrence of all things enacted in his presence upon the hearing, if such things are to be made the subject of complaint here."

The foregoing procedure is not inconsistent with that required by Rule 73 (g), **Rules of Civil Procedure**, and adopted by Rule 39 (b), **Rules of Criminal Procedure**, followed by the federal courts. The United States Supreme Court in **McCrone v. United States**, 307 U. S. 61, 65, 59 S. Ct. 685, 687, had this to say on the question:

"There remains the suggestion that the appeal in question can be considered a civil appeal properly taken under Rule 73 of the new Federal Rules of Civil Procedure which became effective September 16, 1938, 28 U. S. C. A., following section 723c. However, petitioner's notice of appeal was filed May 2, 1938. The controlling statute requires application for allowance of a civil appeal within three months after judgment from which appeal was sought. The three months expired July 28, 1938, and the contempt judgment had become unappealable well before the effective date of the new Rules. Therefore petitioner is not aided by the provision of Rule 86 that the new Rules shall 'govern all proceedings in actions then pending [September 16, 1938] . . . .' The action from which there was then no right of ap-

peal was not pending within the meaning of the Rule.

"The Court of Appeals was not in error in dismissing petitioner's appeal for failure to comply with the statutory requirements governing civil appeals. Its judgment is affirmed."

In view of the foregoing, counsel for the Respondent submits that there is nothing set out in the petition filed in this cause nor the record or opinion of the Tennessee Supreme Court to indicate that the law in its regular course of administration through courts of justice was not applied in this cause as required by the Fourteenth Amendment, Constitution of the United States, and in accordance with the explanation in **Leeper et al. v. State of Texas**, 139 U. S. 462, 35 L. Ed. 225, holding that by the Fourteenth Amendment the powers of states in dealing with crime within their borders are not limited except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary powers of the government unrestrained by the established principles of private right and distributive justice. **Hurtado v. California**, 110 U. S. 516, 535.

Respectfully submitted,

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Attorney General,
State of Tennessee.

By THOMAS E. FOX,
Assistant Attorney General,
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I certify that I forwarded a copy of this Answer to Petition for Writ of Certiorari to Mr. John S. Wrinkle, Attorney at Law, 1521 Hamilton National Bank Building, Chattanooga, Tennessee, on this the 16 day of July, 1954.

Thomas E. Fox,
Assistant Attorney General,
State of Tennessee.